Supreme Court, U.S.
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No. 91-1497

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

JIM JOINER; JOHN MILNER

Petitioners,

v.

MAJOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Lower Court's Opinion conflicts with legal precedent that was in effect at the time that the Officers were discharged, including the Opinions of the United States Supreme Court?

II. Whether the United States Supreme Court should grant the Petition wherein the Petitioners now seek to advance arguments not made in the Alabama Supreme Court?

III. Whether the United States Supreme Court should grant the Petition where there are other grounds which support the conclusion reached by the Alabama Supreme Court in this case?

IV. Does the Alabama Supreme Court Opinion in this case have the far reaching effect as claimed by the Petitioners?

PARTIES TO THE PROCEEDING

The Respondents adopt and incorporate the Petitioners' Statement of the Parties to the Proceeding.

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OPINIONS BELOW

The Respondents adopt and incorporate the Petitioners' statement of the Opinions Below.

JURISDICTION

The Respondents adopt and incorporate the Petitioners' statement of Jurisdiction.

STATUTES INVOLVED

The Respondents adopt and incorporate the Petitioners' statement of Statutes Involved, however, the Respondents state that Alabama Code § 11-43-160 (1975) has no application to the issues currently before the United States Supreme Court.

STATEMENT OF THE CASE

The Respondents take exception to the Petitioners' Statement of the Case insofar as it embellishes the "facts". It would be impossible for the Respondents to specify each "fact" in contention and keep this Brief within the page limitations prescribed. However, the Respondents would generally state that where the Petitioners have asserted facts which are neither supported by reference to a portion of the record nor by a portion of the Appendix or where the Petitioners have supported their contentions by reference to their Complaint which is a part of their Appendix, those facts are generally unsupported by the record in the Court below or are an embellishment of the facts.

Since the central issue in this case involves the procedures afforded the Officers prior to their termination, the Respondents will supplement the Petitioners' Statement of the Case with a more detailed statement of the proceedings leading up to the termination of the Officers with appropriate references to the record in the Court below.

In October of 1983, Mayor Reid prepared a proposed budget for the following fiscal year (1984). (R.T. 189, 471-473.) Joiner was involved in the preparation of the budget with Reid and had input into its contents. (R.T. 190-191). The proposed budget for 1984 included substantial salary raises for the Officers, and Joiner was to be awarded a newly created position of Administrative Assistant. (R.T. 190). The Administrative Assistant position would pay an additional salary in the range of $3,000.00 to $5,000.00. (R.T. 594-595).

The proposed 1984 budget was rejected by the Council. (R.T. 191). The 1984 budget that was ultimately passed did not include the Administrative Assistant position for Joiner, and the proposed raises for the Officers and other Town employees were reduced to 12%. (R.T. 192).

After Reid's proposed 1984 budget did not pass, the Officers discovered that two members of the Council (Peyton and Keith) had purchased tires for their personal vehicles through the Town's account. (R.T. 473-474). Buying tires through the Town's account allowed the individuals to take advantage of the Town's discount, thereby, allowing the individuals to buy the tires at below retail price. The Officers claim that Milner discovered the invoices reflecting that tires had been purchased through the Town's account, and he showed the invoices to Joiner. (R.T. 192-193).

In early December of 1983, Joiner took the invoices and showed them to Mayor Reid. (R.T. 193). Joiner testified that he turned this matter over to the Mayor, because he felt that was the proper means for handling the situation. (R.T. 193). The invoices reflect that Peyton and Keith purchased tires through the Town's account. (Plaintiffs' Exhibit 1 through Plaintiffs' Exhibit 5). In addition to the two Councilmen, however, the invoices also reflect that Bobby Keith, the son of Frank Keith, purchased tires through the Town's account. (R.T. 248). Bobby Keith was not and has never been a member of the Council. (R.T. 248).

Keith and Peyton subsequently took the matter themselves to the State Ethics Commission in Montgomery, Alabama and

to the Jefferson County District Attorney's office. (R.T. 597). They were informed that the matter should be resolved internally by the Town Council. (R.T. 597).

On December 17, 1983, a Saturday, late at night, the Officers called Keith, Peyton, Lollar and Reno at their homes and asked them to come to the Town Hall. (R.T. 76-77, 193-194). The Officers called this meeting to confront Keith and Peyton with the tire situation, and Milner initially informed Keith that he was going to read Keith his rights. (R.T. 78, 194). The meeting generally accomplished nothing, except upsetting the individuals involved. (R.T. 195). The Officers did not consult with Mayor Reid before calling the Councilmen to the Town Hall, nor was Mayor Reid advised of the same in advance of said meeting. (R.T. 194). It is noteworthy that the Officers never made any attempt to question or otherwise pursue Bobby Keith (the non-Councilman) about his purchase of tires. (R.T. 76-77, 193-194).

The next day, on December 18, 1983, the Council met in special session to arrive at a solution to the tire situation. (R.T. 195-196). Generally, the Council agreed that the solution to the problem was to have Peyton and Keith pay the difference between the Town discount and the retail price of the tires, and Peyton and Keith would not approve anymore purchase orders on behalf of the Town of Morris. (R.T. 596; Joint Exhibit 3). Following this meeting, Mayor Reid advised the Officers that the Council had handled the situation, and this was to be the end of the matter. (R.T. 359).

Also, around this same time, there was an incident involving the viewing of some "x-rated" movies in the police department. According to Joiner's testimony, he was in the police office when several unidentified individuals began watching the "x-rated" movies. (R.T. 247-248). Once the movies began, and Joiner saw that they appeared to be "x-rated", he left the office without taking any action to prohibit the viewing of the same. (R.T. 247-248). Subsequently, Mayor Reid became aware of the incident, and in December of 1983, he posted a note on the police office door stating that no further viewing of "x-

rated" movies would be allowed within the department. (R.T. 237).

Subsequent to the rejection of Mayor Reid's proposed 1984 budget, the relationship between the Officers and the Council deteriorated substantially as exemplified by the evidence.

After the proposed budget was rejected, Chambers attempted to talk to Joiner about the various events, but Joiner refused to talk to Chambers responding that he did not have "a damn thing to say" to Chambers. (R.T. 618-619).

During this same time frame, Chambers complained that the Officers were not actively patrolling his skating rink business located in the Town of Morris. There had been no problems patrolling his business before the rejection of Mayor Reid's proposed budget. (R.T. 618-619).

Following the rejection of Mayor Reid's proposed 1984 budget, there was an occasion where Chambers was approached by Milner, and Milner asked if he could discuss some of the events with Chambers. Chambers noted that there appeared to be something irregular on Milner's person, and when he asked Milner about it, Milner produced a tape recorder from his pocket. Chambers suspected that Milner intended to record the conversation. (R.T. 623-624).

There was also an incident in this time frame in which Joiner borrowed Milner's tape recorder and recorded a telephone conversation with Mayor Reid. (R.T. 205-206). Milner knew that Joiner intended to tape Reid's conversation. (R.T. 205-206). Joiner discussed the problems with Reid during the conversation and recorded the same without Reid's knowledge or permission. (R.T. 205-206).

The deterioration of the relationship between the Council and Officers is further exemplified by the fact that the Officers took the position that they were under no obligation to cooperate with Keith or follow his directives. (R.T. 238-240, 338). This is significant, because Keith had been appointed by Mayor Reid as the Councilman responsible for overseeing the operations of the police department. (R.T. 602).

Joiner's own realization of the deterioration of the relationship is exemplified by his testimony that as early as December, 1983, Joiner feared that his job was in jeopardy. (R.T. 234).

On December 27, 1983, the Town Council met in regular session. All Councilmen were present except Reno and Lollar. (Joint Exhibit 4). At this meeting, the November Financial Statement was distributed, and Mayor Reid discussed the financial strain that was afflicting the Town. A motion was made that the Town borrow $8, 500.00 on a ninety-day note to cover payroll expenses. (R.T. 599; Joint Exhibit 4). The motion was unanimously approved by the Councilmen in attendance. (Joint Exhibit 4).

Around the first of 1984, Keith decided to alter the work schedules within the Police Department. (R.T. 620). Both of the Officers resented the schedule changes, and both openly complained that the changes were in retaliation for their involvement in the tire situation. (R.T. 237, 620).

The Council next met in regular session on January 10, 1984. (Joint Exhibit 5). All Councilmen were present with the exception of Lollar. (Joint Exhibit 5). At this meeting, the financial status of the Town was discussed, and a motion was made to lay off Jimmy Traywick (the dispatcher), demote Frankie Witt (a police officer) to the dispatcher position, cut all regular full-time employees' salaries 5%, and thereafter make an in-depth study of finances every thirty days. (R.T. 599; Joint Exhibit 5). The motion was approved by all Councilmen present with the exception of Mayor Reid who voted against it. (R.T. 199, 600; Joint Exhibit 5).

It is noteworthy that the Council's actions affected several individuals who were not involved in the tire situation. Traywick was laid off, Witt was demoted, and the 5% pay cut applied to the City Clerk, Anna Grooms. (R.T. 196-197).

It is also noteworthy that the 5% pay cut, when applied to the previous 12% raise, still left the Officers with a net 7% raise over their 1983 salaries. (R.T. 241).

At the January 10, 1984 Council meeting, the Councilmen present also unanimously approved the use of daily shift reports, and approved the practice of policemen logging in and out of service with the dispatcher and/or clerk while on duty. (Joint Exhibit 5). Chambers explained that he voted in favor of the additional reporting, because there was a perceived need to know where the policemen on duty were at any given time for safety reasons. (R.T. 601-602). A copy of the "Daily Shift Report" and the directive regarding logging in and out of service are attached to the minutes for the January 10, 1984 Council Meeting. (Joint Exhibit 5).

The Officers resented the pay cut and the directives and voiced their opinions that these actions by the Town Council were in retaliation for the Officers' involvement in the tire situation. (R.T. 582, 602-603, 620-621).

The Council next met in regular session on January 24, 1984. (Joint Exhibit 6). All Councilmen, the Officers, members of the public and the press were present at this meeting. (R.T. 201, 325; Joint Exhibit 6). Without any forewarning, Joiner stood up in the Council meeting, before the Council, the members of the public present and the press and read a letter to the Council stating that the recent pay cuts and layoffs were in retaliation for the tire situation. (R.T. 200; Joint Exhibit 6). Joiner knew that the press was present when he read his letter in the meeting. (R.T. 201). Joiner did not advise anyone, including the Council members, that he intended to read the letter prior to reading the same, nor did he show anyone a copy of the letter prior to reading the same in the Council meeting. (R.T. 201).

The Council next met in regular session on February 14, 1984. (Joint Exhibit 7). All Council members were present except Keith and Chambers. (Joint Exhibit 7). Near the end of this meeting, Mayor Reid called upon the members of the public present for any comments concerning the Town, and Milner's wife questioned the Town spending money on the ball park after cutting employees' (including her husband's) salaries. (Joint Exhibit 7). Mayor Reid explained that the

money used for the ball park was derived from a revenue sharing program, and that money was specifically earmarked for the ball park and senior citizen activity. (Joint Exhibit 7).

The Council next met in regular session on February 28, 1984. (Joint Exhibit 8). During this meeting, Chambers questioned the Town paying for full family medical coverage for Joiner. (Joint Exhibit 8). In response to the previous discussions about the financial status of the Town, Chambers had requested Keith to provide Chambers with a full breakdown of the expenses within the police department (Keith was in charge of the Police Department). (R.T. 607-609). When Chambers reviewed the detailed breakdown, he discovered that the Town was paying for full family medical insurance for Joiner. (R.T. 607-609). Chambers recalled that in the January 26, 1982 meeting the Council voted to provide only single coverage health insurance for new employees, effective January 26, 1982. (R.T. 482, 593-594; Joint Exhibit 1). Since Joiner resigned from his position in February of 1982 and was subsequently rehired in March of 1982, Chambers took the position that the Town should not provide him with full family medical insurance. (Joint Exhibit 2, Joint Exhibit 8, Defendants' Exhibit 3). All Councilmen, except Mayor Reid and Lollar, voted in favor of only paying for Joiner's individual medical insurance. (Joint Exhibit 8). Lollar and Reid voted against cutting Joiner's insurance benefit. (R.T. 200, 481).

Subsequent to the action of the Council cutting Joiner's insurance benefit, the Officers again raised the tire situation and accused all Council members of cutting Joiner's insurance benefit in retaliation for the tire incident. (R.T. 582, 621).

Either the last day of February, 1984 or the first day of March, 1988, Joiner moved out of the Town of Morris to Jasper, Alabama. (R.T. 180-181). Joiner explained that he moved and his wife took a job at this time because it was apparent to him that he was going to be terminated. (R.T. 183-184).

The Town Council next met in regular session on March 13, 1984. (Joint Exhibit 9). All Council members and the Officers were present. (Joint Exhibit 9). During this meeting, Mayor

Reid read and discussed "Resolution Number 84-3", which was unanimously approved by the Council. (Joint Exhibit 9). "Resolution Number 84-3" stated as follows:

> WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> WHEREAS, the Council wants to try to resolve the problems as it is detrimental to the operation of the Town.
>
> WHEREAS, the Council is giving two weeks to work the problems out and if a resolution cannot be settled on, then the Council will have to resolve the matter at the next Council meeting.

(Joint Exhibit 9). Joiner and Milner were present at this meeting and heard the Mayor read the Resolution. (R.T. 201-202, 326). The Officers also once again heard the Councilmen discuss the problems between the Council and the Officers. (R.T. 201-202).

After Mayor Reid read "Resolution Number 84-3", and it was unanimously adopted by the Council, Milner asked Mayor Reid to explain the Resolution. (R.T. 327; Joint Exhibit 9). Reid explained that the Council was willing to meet with the Officers within the next two weeks to get any input that the Officers had into finding a solution to the problems, but if no solution was reached by the next Council meeting, then the Council would bring their own solution to the table. (R.T. 327-328; Joint Exhibit 9). The Council agreed to set a meeting date with the Officers to discuss the problems. (Joint Exhibit 9). Milner was not satisfied with Mayor Reid's explanation. (R.T. 328).

On March 15, 1984, the Officers and the Council met in special session to discuss settling the problems that had arisen between the Officers and the Council. (R.T. 202; Joint Exhibit 10). The minutes of the meeting reflect that many problems were discussed by the Council and the Officers including the following: (1) the business of the Town was not being handled

properly; (2) there was a lack of cooperation between the Officers and the Council; (3) Chief Joiner moved out of town to Jasper; (4) Joiner acquired an unlisted phone number at home; (5) Joiner would not answer telephone calls; (6) the Officers failed to get the anticipated raise in salary; (7) bringing television media to the Council meetings was wrong; (8) the tire situation was handled wrong; (9) the Mayor should have handled the tire situation in its entirety; (10) the salary cuts were justified and in the best interest of the Town; (11) the method for preparation and approval of the 1984 budget should have been handled differently; (12) feelings were hurt on both sides; (13) misunderstandings and misinformation were contributing to the problems between the Council and the Officers, and (14) a new procedure needed to be devised for following up on outstanding bonds from court work. (Joint Exhibit 10). Joiner admits that during this meeting he advised the Council that he would not be satisfied under any circumstances until he got back his 5% raise and his full family insurance benefits, and he further stated that the problems between the Council and the Officers were not going to go away until he got them back. (R.T. 129, 204-205). Milner claims that he was told to sit down and shut up during the course of this meeting. (R.T. 204, 239). Notably, this is the *only* meeting where Milner claims he was prevented from speaking, and Joiner does not claim that he was ever prevented from speaking. (R.T. 331). The Councilmen deny that Milner was ever told to sit down and shut up at any meeting, including the March 15, 1984 meeting. (R.T. 488, 613). During this meeting, the Officers did not advise the Council that they intended to file a lawsuit against the Council members in the near future. (R.T. 206).

On March 23, 1984, eight days following the special session, the Officers filed suit against the Council. (R.T. 206; Defendants' Exhibit 1). The Officers' Complaint named each and every one of the Council members in their official capacities and also named Keith and Peyton in their individual capacities as well. (Defendants' Exhibit 1). The Complaint alleges that

the pay cuts, reduction of Joiner's insurance benefits, scheduling changes and other changes within the police department were done in retaliation for the Officers' involvement in the tire situation. (R.T. 207-208; Defendants' Exhibit 1). The Complaint states four counts, each seeking $250,000.00 in damages against each and every one of the Council members regardless of whether the individual Council member had voted in favor of the Officers on any particular issue or whether the individual Council member was even present at any particular meeting. (R.T. 206-207; Defendants' Exhibit 1).

The Council next met in regular session on March 27, 1984. (Joint Exhibit 11). All Council members and the Officers were present at this meeting. (R.T. 613-614; Joint Exhibit 11). During the course of this meeting, the problems between the Officers and the Council were again discussed, and Reno, Chambers and Peyton all made comments regarding the same. (R.T. 330-331, 614; Joint Exhibit 11). The Officers were given an opportunity to respond, but Milner made no comment. (R.T. 330, 316-314).

Immediately following the regular session on March 27, 1984, the Council met in a special session to further discuss a resolution to the problems between the Officers and the Council. (Joint Exhibit 11). During this meeting, the Council discussed the fact that they had previously agreed to give the Officers two weeks to work out the problems, and if no agreement was reached between the parties, then concrete action was to be taken at the March 27, 1984 regular session. (Joint Exhibit 11). The Council noted that no agreement had been reached between the parties, and since their last meeting, the Officers had filed their previously referenced lawsuit. (Joint Exhibit 11). The Council further discussed that the situation between the Council and the Officers was hindering their ability to give the Town the services it deserved. (Joint Exhibit 11). At the conclusion of this meeting, the Council agreed to meet again on March 29, 1984 to make a final decision about what action to take to end the problems between the Council and the Officers. (Joint Exhibit 11).

The Council next met in special session on March 29, 1984 for the purpose of arriving at a solution to the problems existing between the Officers and the Council. (Joint Exhibit 12). Prior to this meeting, Joiner heard that the Council had made up its mind to terminate him at this meeting. (R.T. 235). All Council members and the Officers were present at this meeting. (R.T. 210-211; Joint Exhibit 12). News reporters and television cameras were also present at this meeting. (R.T. 216, 618).

Mayor Reid opened the meeting by explaining that the purpose of the meeting was to resolve the conflict between the Officers and the Council. (Joint Exhibit 12), He explained that the matter was open for discussion, and any and all opinions on the subject would be welcomed. (Joint Exhibit 12). He advised that Council members would speak first and then anyone else could speak. (Joint Exhibit 12). During this meeting, the Councilmen stated that they had met with the Officers in an attempt to work things out, but it now appeared that any decision made by the Council members would be overshadowed by the threat of a lawsuit, and the day-to-day business of the Town was not being properly conducted as a result of the deteriorated relationship between the Council and the Officers. (Joint Exhibit 12). Joiner and Milner were in attendance at this Council meeting and were given an opportunity to be heard. (R.T. 215; Joint Exhibit 12).

During the meeting, several citizens spoke on the subject of various complaints. (R.T. 211, 333; Joint Exhibit 12). Generally the citizens backed the Council, did not like the adverse publicity that the Town had received as a result of the way the Officers had handled the tire situation and objected to the showing of x-rated movies in the police department. (R.T. 333-334; Joint Exhibit 12).

During this meeting, both Officers were present and given an opportunity to respond to the various complaints. (R.T. 615).

Mayor Reid read a statement concerning the matter, stating that the situation had severely hampered the day-to-day opera-

tion of the Town's business, and that in light of the situation, he recommended the Officers resign. (Joint Exhibit 12). He further recommended that the Officers should be terminated if they chose not to resign. (Joint Exhibit 12).

Mayor Reid called upon the Officers to make any comments or present their side of the story. (R.T. 216). Joiner responded that he would not resign, because he had done nothing wrong. (R.T. 222). Milner's only comment was that he would not resign, although his wife was present and did speak out in defense of her husband. (R.T. 211, 334).

After the Officers refused to resign, the Council voted to adopt the Resolution of Mayor Reid. All Councilmen voted in favor of terminating the Officers with the exception of Keith and Peyton who abstained from voting. (R.T. 222, 338; Joint Exhibit 12).

The Council members who voted in favor of the termination were in no way involved in the tire incident. (R.T. 223). Furthermore, Chambers, who voted in favor of termination, testified at trial that he did not get along with Peyton and Keith anyway, and they would not have been able to influence his vote. (R.T. 592, 624-625).

Following their termination, the Officers had a right to a post-termination hearing under the "Town of Morris Personnel Policy". (R.T. 584; Plaintiffs' Exhibit 6). The Officers were sent letters advising them that their termination would be effective immediately, and that the grounds for their dismissal were those stated in the previous meeting. (R.T. 224; Defendants' Exhibit 4). The letter further advised them that a more detailed statement of the charges would be made available upon request. (Defendants' Exhibit 4).

Neither of the Officers requested a more detailed list of charges, nor did they seek any post-termination hearing as provided for under the "Town of Morris Personnel Policy". (R.T. 226, 623). It is noteworthy that Frankie Witt, the officer who was demoted to dispatcher, was represented by the same attorney that represented Joiner and Milner. (R.T. 622-623).

Subsequent to the adverse action by the Council, Witt requested a post-deprivation hearing under the Personnel Policy. (R.T. 622-623). Witt, who was represented by the same attorney representing the Officers, was given a post-deprivation hearing in accordance with the "Town of Morris Personnel Policy" on January 26, 1984. (R.T. 622-623; Joint Exhibit 6).

Instead of seeking a post-termination hearing under the "Town of Morris Personnel Policy" the Officers merely amended their Complaint to allege that, in addition to the previous actions of the Council, the Council's termination of the Officers was in retaliation for the Officers' involvement in the tire situation. (R.T. 226, 623; C.R. 15).

REASONS FOR DENYING PETITION

The Respondents respectfully state that this Court should deny the Petition on both jurisdictional and procedural grounds. Specifically, the Respondents state that the reasons for denying the Petition include: (1) that the Alabama Supreme Court Opinion does not conflict with legal precedent, including this Court's opinions, that were in effect at the time the Officers were terminated; (2) that the Petitioners now seek to advance arguments not made in the Court below; (3) that there are legal grounds to support the Alabama Supreme Court's opinion other than those specifically relied upon by the Alabama Supreme Court but advanced by the Respondents in that Court, and (4) that the Alabama Supreme Court opinion does not have the potential far reaching effect as claimed by the Petitioners. Each of the above-said grounds for denying the Petition will be discussed with more specificity in the following separately enumerated sections of this Brief.

I.

THE LOWER COURT'S OPINION DOES NOT CONFLICT WITH LEGAL PRECEDENT THAT WAS IN EFFECT AT THE TIME THAT THE OFFICERS WERE DISCHARGED, INCLUDING THE OPINIONS OF THE UNITED STATES SUPREME COURT.

It is important to note that the Petitioners did not present an argument that the Alabama Supreme Court should retroactively apply *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) in the proceedings below. *Roberts v. Joiner*, 590 So. 2d 195, 198 (Ala. 1991). The Officers were terminated on March 29, 1984 prior to the release of *Loudermill*. Therefore, the issue of what process was due the Petitioners was correctly resolved by the Alabama Supreme Court analyzing legal precedent that was in force and effect at the time the Officers were terminated.

The Petitioners attempt to circumvent this flaw in the procedural history of this case by citing several of this Court's opinions preceding *Loudermill* and representing to this Court that those opinions held that employees with a proprietary interest in their jobs are entitled to pre-termination notice and a pre-termination hearing under the due process requirements of the Fourteenth Amendment. Thus, the Petitioners further argue that *Loudermill* need not be retroactively applied, because *Loudermill* did not establish a new principle of law but merely restated a principle of law which had been previously established in this Court's opinions. The Respondents shall demonstrate in this section of the Brief that this aspect of the Petitioner's argument is without merit, and that the Alabama Supreme Court opinion does not conflict with the applicable legal precedent at the time that the Officers were terminated.

First, it should be noted that contrary to the Petitioner's contention, not a single pre-*Loudermill* case cited by the Petitioners "held that an individual with a property interest in his employment is entitled to receive notice of charges against him and a hearing on the charges prior to being discharged".

Petition for Writ of Certiorari, Page 16. The Petitioners would lead this Court to believe that the above-said opinions clearly held that the due process requirements of the Fourteenth Amendment require that the Officers receive pre-termination notice and a pre-termination hearing, but as can be seen from a cursory review of the decisions, such is not the case.

The fallacy of this aspect of the Petitioners' argument is further demonstrated by a brief historical summary of this Court's opinions leading up to the opinion in *Loudermill*.

In the beginning, this Court held that public employees did not have a proprietary interest in employment and were nothing more than employees at will. Thus, in early cases, the Court held that a public employee was afforded no Constitutional protection. *Reagan v. United States*, 182 U.S. 419 (1901).

It was not until the mid 1950's that the Court began to recognize that a public employee might be entitled to some degree of Constitutional protection. *Wieman v. Updegraff*, 344 U.S. 183(1952) and *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

At this point in history, however, the Court had only begun to consider the extent of Constitutional protection. The Court had yet to articulate the extent of Constitutional protection afforded a public employee and certainly had not gone as far as holding that the due process requirements of the Constitution required pre-termination notice and a pre-termination hearing.

In fact, the Court refused to hold that due process requirements of the Constitution required pre-termination notice and a pre-termination hearing in at least two cases prior to *Loudermill*.

The first such case is *Cafeteria and Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886 (1961). In *McElroy*, the commander of a military installation effectively discharged a civilian employee who worked on the military installation without any prior notice or opportunity to be heard. While the commander cited security reasons for denying the employee access

to the base, he would not elaborate on his reasons any further and denied the employee any opportunity (either before or after termination) to be heard on the charges stating that such a meeting would serve no useful purpose. In examining the issue of whether the commander's actions violated the due process requirements of the Constitution, the Court stated:

> The Court has consistently recognized that an interest closely analogous to Rachael Brawner's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. (Citations omitted)
>
> . . .
>
> Nothing that was said or decided in *United Public Workers* or *Wieman* would lead to the conclusion that Rachael Brawner could not be denied access to the Gun Factory without notice and an opportunity to be heard. Those cases demonstrate only that the State and Federal Governments, even in the exercise of their internal operations, do not Constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exists Constitutional restraints upon State and Federal governments in dealing with their employees is not to say that all such employees have a Constitutional right to notice and a hearing before they can be removed.

McElroy at 896-898. Thus, the Court held that the employee was not entitled to pre-termination notice or a hearing of any kind (either before or after the effective discharge).

The Court again examined this issue in *Arnett v. Kennedy*, 416 U.S.. 134 (1974) and once again refused to hold that the due process clause of the Constitution required pre-termination notice and a pre-termination hearing. Justice Rehnquist, writing for the plurality, held that an employee terminated for

criticizing other employees could be terminated without pre-termination notice and a pre-termination hearing.

Arnett continued to be valid law until the Court next addressed this issue in *Loudermill.*

As can be seen from the foregoing brief historical summary of the Court's Opinions dealing with this issue, *Loudermill* clearly established a new principle of law by establishing for the first time that the due process clause of the Constitution requires pre-termination notice and an opportunity to be heard before a public employee with a proprietary interest in continued employment can be discharged.

If Petitioners' argument is correct, then *Loudermill* is a relatively insignificant opinion doing nothing more than restating an already clearly defined principle of law. Legal commentators notably disagree with this view.

> Although supported by plurality of only three Justices, Justice Rehnquist's Opinion in *Arnett* governed the procedural due process rights of public employees until the Court's recent Decision in *Cleveland Board of Education v. Loudermill.*

Howard, *Cleveland Bd. of Ed. v. Loudermill: Procedural Due Process Protection for Public Employees,* 47 Ohio St. L.J. 1115 (1986).

> Given the sharply divided nature of the *Arnett* Court, considerable doubt remained as to whether and when due process requires a pre-termination hearing. This uncertainty lead to an inconsistency in judicial decisions dealing with pre-termination due process and a corresponding lack of predictability for both public employers and their employees. It was not until more than ten years later, in *Cleveland Board of Education v. Loudermill,* that the Supreme Court again directly addressed the issue of the pre-termination process due public employees.

McRea, *Loudermill — What Pre-Termination Process is 'Due' Public Employees,* LX Fla. Bar. J. 37 (1986).

> Before *Loudermill*, it was not clear whether the principle that one had to take the bitter with the sweet would be applied to efforts to establish a due process violation of a property right. It was known neither when a hearing had to be held if the government tried to infringe on a protected property right, nor what sort of hearing was actually to be required if such an infringement was contemplated.

Gamso, *Tenured Public Employee Entitled to Pre-Termination Hearing Regardless of Statutory Procedures for Dismissal: Cleveland Bd. of Ed. v. Loudermill*, XVIII Tex. Tech. L. Rev. 225 (1986). "

> The Supreme Court had yet to definitely come to grips in these prior decisions with the issue of whether or not a state could create a limited property interest in employment — limited, that is, by the statutory procedures enacted for its deprivation — or whether a property interest once conferred was subject to Federal Constitutional considerations regardless of any statutorily imposed limitations. In the case under consideration, *Cleveland Board of Education v. Loudermill*, however, the Court laid this question to rest. In an 8-1 decision, the Court held that property interests, once conferred, are subject to Constitutional protections and that only nonproperty expectations in employment can be limited by State procedural regulations.
>
> . . .
>
> *Even more dramatically, the Court in Loudermill declared for the first time that State employees with property interest in continued employment have a Constitutional due process right to "some kind of hearing" prior to discharge.*

Foster, *Federal Pre-Termination Rights for State Employees: Cleveland Bd. of Ed. v. Loudermill*, 54 U. Cin. L. Rev. 1069 (1986) (emphasis added).

The commentary above clearly demonstrates that the Plaintiff's argument is erroneous, and under the circumstances, the Alabama Supreme Court was correct in utilizing

pre-*Loudermill* precedent to analyze this case. Furthermore, it is clear that the Alabama Supreme Court Opinion in this case does not conflict with pre-*Loudermill* precedent.

As noted by the Alabama Supreme Court, the problems between the Officers and the Town Council were discussed not at one, but several, meetings prior to their termination. The Officers attended these meetings and were given an opportunity to speak, and in fact did speak, to the problems at several of these meetings. *Roberts v. Joiner*, 590 So. 2d 195, 197 (Ala. 1991). Furthermore, after they were terminated, the Officers were entitled to written notice setting forth the reasons for termination and a formal hearing. The hearing could be either before the Town Council or an appointed hearing Officer, and the Officers had the right to representation by an attorney and a right to call witnesses and present evidence at the hearing. Subsequent to that hearing, the Officers further had the right to have any adverse decision reviewed by the Circuit Court. *Roberts*, at 201. Instead of pursuing these post-termination remedies, the Officers elected to merely amend their already pending lawsuit. *Roberts*, at 201.

The evidence clearly demonstrates that the Officers were afforded process both before and after their termination.

As stated above, at the time the Officers were discharged, this Court had never gone as far as holding that an employee with a proprietary interest in his job was entitled to pre-termination notice and a hearing. Furthermore, as noted in the Alabama Supreme Court Opinion in this case, this Court's Opinion in *Parratt v. Taylor*, 451 U.S.. 527 (1981) supports the Alabama Supreme Court's Opinion. "The legacy of *Parratt* and its progeny is that such unauthorized conduct, as the Plaintiff complains of in this case, can be cured by various post-deprivation remedies which can be provided by the State." *Goolsby v. City of Montgomery*, 805 F. 2d 1008, 1011 (11th Cir. 1986) and *See also Lee v. Hutson*, 810 F. 2d 1030 (11th Cir. 1987). In this case, it is clear that the Officers do not attack the procedures afforded per se, but attack the application of the procedures and the conduct of the individual councilman in their specific

case. Under the Officer's theory, it is clear that post-deprivation remedies available to the Officers both in the "Town of Morris Personnel Policy" and under the applicable Alabama case law satisfy the due process requirements of the Fourteenth Amendment as articulated in the pre-*Loudermill* case law.

II

THE PETITIONERS NOW SEEK TO ADVANCE ARGUMENTS NOT MADE IN THE ALABAMA SUPREME COURT.

Although the Petitioners state that they are not asking the Court to retroactively apply *Loudermill,* their argument implicitly invites the Court to do so. *Loudermill* is the only case cited by the Plaintiffs which supports their contention that the Plaintiffs were entitled to pre-termination notice and a pre-termination opportunity to be heard.

As noted above, the Petitioners did not request the Alabama Supreme Court to retroactively apply *Loudermill,* and therefore, this Court should refrain from applying the standards articulated in *Loudermill* to the case at bar. The Petitioners are not allowed to assert new legal arguments at this stage in the litigation. *Head v. New Mexico Bd. of Examiners in Optometry,* 374 U.S.. 424, 432 (1963).

III.

THERE ARE OTHER GROUNDS WHICH SUPPORT THE ALABAMA SUPREME COURT'S OPINION IN THIS CASE WHICH MAY NOT HAVE BEEN SPECIFICALLY RELIED UPON BY THE ALABAMA SUPREME COURT BUT WERE ADVANCED BY THE RESPONDENTS IN THAT COURT.

Where the decision of the lower court is correct in result, it must be affirmed by the appellate court, even though the

lower court may have reached the result on erroneous grounds. *Riley Inv. Co. v. Commissioner of Internal Revenue*, 311 U.S. 55, 59 (1940). In this section of their Brief, the Respondents shall demonstrate that the result reached in the Alabama Supreme Court was the correct result for a number of reasons, even though the Alabama Supreme Court may not have specifically relied upon the arguments herein below. It should be noted that each of the following arguments were advanced by the Respondents in the Alabama Supreme Court.

A. *The Officers were given all of the due process required by law even if this Court were to retroactively apply the standards articulated for the first time in* Loudermill.

Assuming for the sake of argument that *Loudermill* is to be applied retroactively, and the Officers were entitled to pre-deprivation notice and a hearing, it is clear that the Officers were nonetheless afforded all of the due process required by law. All that *Loudermill* requires is notice of a reason for discharge and some sort of hearing affording the Officers an opportunity to be heard. There is no requirement that the Officers be given notice of and an opportunity to be heard upon all reasons for dismissal. As long as the Officers were given notice of and an opportunity to be heard on any reason justifying dismissal, that satisfies the due process requirements of the Fourteenth Amendment. *Carpenter v. City of Greenfield School District Number 6*, 358 F.Supp. 220 (E.D. Wis. 1973). Nor is there any requirement that the board making the decision be the same board which held the "hearing" or heard the evidence. *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976). The "hearing" need not be a formal trial, and the notice need not be in writing.

In the case at bar, it is clear that the Officers were repeatedly advised and warned of the Council's opinion that the Officers had various problems and in particular with the Officers' performance of their duties. (R.T. 202-205, 210-223, 325-335,588; Joint Exhibits 4 through 12).

The problems with the police department and the Officers were discussed by the Town Council on no less than four separate occasions. On each of these occasions, the Officers admit that they were present, and heard the substance of the complaints. At each of these meetings, the Officers acknowledge that they were given an opportunity to respond (with the exception of the March 15, 1984 meeting in which Milner claims that he was told to sit down and shut up). (R.T. 202-205, 210-223, 325-335, 588; Joint Exhibits 4 through 12).

On March 13, 1984, Mayor Reid proposed a resolution acknowledging that a problem existed between the Town Council and the Officers. That resolution was unanimously passed. The resolution adopted by the Town Council stated as follows:

> WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> WHEREAS, the Council wants to try to resolve the problems as it is detrimental to the operation of the Town.
>
> WHEREAS, the Council is giving two weeks to work the problems out and if a solution cannot be settled on then the Council will have to resolve the matter at the next council meeting.

The Officers were present at this meeting, and John Milner asked Mayor Reid to explain the resolution. Mayor Reid explained that the Council was publicly recognizing that a problem existed between the Council and the Officers, and that the Council was willing to meet with the Officers within two weeks and discuss any possible solutions. If no solution was reached by the next Council meeting, the Council would bring their own solution to the table. The Council agreed to set a meeting date when all parties could discuss the matter. (R.T. 326-328; Joint Exhibit 9).

On March 15, 1984, the Council members met with the Officers in a special meeting to again discuss the problems. Again, both Officers were present at this meeting and heard

the complaints made by the council members. Joiner admits he was given an opportunity to respond, but Milner claims he was told to sit down and shut up at this meeting when he attempted to speak. (R.T. 202-209, 331; Joint Exhibit 10). Mayor Reid and Councilman Chambers deny that Milner was ever told to sit down and shut up or that Milner was ever denied the opportunity to respond. (R.T. 488, 613).

The Town Council met again in regular session on March 27, 1984 and once again discussed the problems. (Joint Exhibit 11). Again, the Officers were present at this Town Council meeting and heard the complaints of the Councilmen. (R.T. 209, 331).

A special session of the Town Council met again on March 29, 1984 for the expressed purpose of arriving at a solution to the problems existing between the Officers and the Town Council. This was an open public meeting, and several members of the community attended and voiced their opinions on the subject. Again, both Officers were present at this council meeting and were given an opportunity to respond to the complaints which were made during the course of the meeting. After the Officers were given an opportunity to respond, the Mayor made a recommendation that the Officers resign, and if they would not resign, then he recommended that the Council terminate both the Officers. Joiner and Milner stated that they would not resign. Councilman Chambers made a motion that the Town accept the recommendation of the Mayor and said motion was unanimously passed with Frank Keith and Earl Peyton abstaining from the vote. Thus, the Plaintiffs were terminated at that meeting. (R.T. 210-223, 331-336; Joint Exhibit 12).

It is clear from the foregoing factual scenario that the Officers were afforded the due process required by *Loudermill* on not one, but several occasions. They repeatedly heard the complaints of the Councilmen and were given an opportunity to respond to the same. Any one of these meetings, in and of itself, is sufficient to satisfy the due process requirements of the Fourteenth Amendment as enunciated by *Loudermill*.

B. *Despite the standards articulated for the first time in* Loudermill, *post-deprivation remedies are still sufficient to satisfy due process requirements in this particular case.*

Furthermore, despite changes in the law, the law still recognizes a situation to this date in which post-deprivation remedies cure any pre-deprivation deficiencies with regard to procedural due process. In *Goolsby v. City of Montgomery*, 805 F.2d 1008 (11th Cir. 1986) and *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987), the Court recognized that there are cases in which post-deprivation remedies satisfy the Due Process Clause. In both of these cases, the 11th Circuit held that a pre-deprivation hearing is required only in those cases where the Plaintiff is attacking state procedures as being violative of due process, and cited *Parratt* to support that conclusion. In both of these cases, the Plaintiffs complained of being discharged without being afforded pre-termination due process. In both cases, the Plaintiff did not challenge the procedures per se, but instead, alleged that the persons responsible for executing the procedures had engaged in unauthorized and wrongful conduct. In *Goolsby*, the Plaintiff complained that he was not afforded the notice required by the procedures and was not given a fair trial. In *Lee*, the Plaintiff complained that the Civil Service Board: (1) "failed to weigh independently the evidence and punishment", (2) "failed to afford her an unbiased panel", (3) "did not make a determination based upon the evidence and arguments presented to it", and "the hearing was a sham", and (4) "failed to state which evidence it relied upon in reaching its decision and the reason for that decision". *Lee* at 1031.

In both *Goolsby* and *Lee*, the 11th Circuit held that "the legacy of *Parratt* and its progeny is that such unauthorized conduct, as the Plaintiff complains of in this case, can be cured by various post-deprivation remedies which can be provided by the State." *Goolsby* at 1011.

Similarly, in the case at bar, the Officers do not challenge the procedures per se, but to the contrary challenge the actions and conduct of the Councilmen themselves in their ex-

ecution of these procedures. It is undisputed that the Officers were present at several meetings at which the Town Council discussed the problems with the Officers, and they were present at the meeting where they were ultimately terminated. (R.T. 202-205, 210-223, 325-335; Joint Exhibits 4 through 12). The Officers complain that the decision making body was biased, and that the reasons given for their discharge were a sham. It is clear that the Officers do not attack the procedures per se, but attack the application of the procedures and the conduct of the individual Councilmen in their specific case. Under this sort of theory, it is clear that the post-deprivation remedies available to the Officers both in the "Town of Morris Personnel Policy" and under the applicable Alabama case law satisfy the due process requirements of the Fourteenth Amendment.

C. *The Officers were merely employees at will and were entitled to no due process under the applicable law.*

The Alabama Supreme Court specifically noted that it did not address the issue of whether the Officers had a proprietary interest in their jobs, but instead resolved the issues by finding that they were given all process due assuming there was a proprietary interest involved. Even though the Alabama Supreme Court did not reach the issue of whether the Officers had a proprietary interest, that issue was raised by the Respondents in that Court and a resolution of that issue supports the result reached in the Court below.

In order to avail themselves of the protection of the Fourteenth Amendment and its due process requirements, the Officers must first prove they have a proprietary interest in continued employment with the Town of Morris. "For due process purposes, to have a cognizable property interest in governmental benefits, it is not enough that the claimant has a demonstrated need for such benefits; rather he must have a legitimate claim of entitlement to them." *Anderson v. City of Northlake*, 500 F.Supp. 863, 865 (8th Cir. 1980).

Applicable State Law is to be applied in addressing this threshold question. *Bishop v. Wood*, 426 U.S. 341 (1976). In this case, the laws of the State of Alabama should be applied to determine whether the Officers have met their initial burden of proving that they have a proprietary interest in continued employment with the Town of Morris.

In the trial of this case, the Officers relied upon § 1.29 of the "Town of Morris Personnel Policy", which states as follows:

> *Probationary Period.* The probationary period will be a period of six (6) months. This is a wording (working) test period for both you and your supervisor. When the employee completes this initial stage of employment, he will attain permanent status. This means you have a right to hold your job permanently, *conditioned upon your continued satisfactory performance, honesty, loyalty, and the Town's ability to finance services; not following the specifications, employee is subject to dismissal at any time.*

(C.R. 207-217; plaintiffs' Exhibit 6, page 4 (Emphasis added)).

In *Bishop v. Wood*, 426 U.S. 341 (1976), the United States Supreme Court addressed a substantially similar situation. Bishop was employed by the City of Marion, North Carolina as a policeman, and after six months, he became a "permanent employee". After he attained his "permanent status", he was discharged by the City. The "Personnel Ordinance of the City of Marion" provided in pertinent parts as follows:

> *Dismissal.* A permanent employee whose work is not satisfactory over a period of time, shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge

> setting forth the effective date and reasons for the discharge if he shall request such a notice.

Bishop at 344.

The policeman contended that his "permanent status" and the provisions pertaining to dismissal in the "Personnel Ordinance" created a proprietary interest in continued employment protected by the Fourteenth Amendment. The Supreme Court noted that although the employee had attained "permanent status", there was nothing setting forth the exact duration of his employment. The Supreme Court held that the provisions of the "Personnel Ordinance" could be fairly read as setting forth the conditions for which an employee's removal would be justified as opposed to creating a proprietary right to continued employment.

As can be seen from a comparison between the "Personnel Ordinance" in *Bishop*, and the "Town of Morris Personnel Policy", the two are strikingly similar. Although the "Town of Morris Personnel Policy" refers to an employee attaining "permanent status", there is no specified duration for employment, and the provision is fairly read to set forth the specifications for discharge as opposed to creating a proprietary interest in continued employment.

Furthermore, the conditions applicable to "permanent status" are so broad that they effectively override any proprietary interest in continued employment that might be created by referring to the employee as attaining "permanent status". The effect of these broad conditions is to make the Officers nothing more than employees at will under the applicable Alabama Law. The "Town of Morris Personnel Policy" is insufficient to create a proprietary interest in continued employment under Alabama law.

IV.

CONTRARY TO THE PETITIONERS' CONTENTIONS, THE ALABAMA SUPREME COURT OPINION IS NOT AS FAR REACHING IN EFFECT AS THEY CONTEND.

The Petitioners would have this Court believe that the Alabama Supreme Court Opinion in this case has far reaching effect and will result in the deprivation of procedural due process being afforded to many, if not all, similarly situated employees in Alabama in the future. Such is simply not the case.

The Alabama Supreme Court Opinion itself notes that, "we intend that holding to be construed narrowly." *Roberts*, at 201.

In fact, the Opinion has little, if any, precedential effect. It is clear that the Alabama Supreme Court limited its holding to the particular facts of the case, therefore, the Opinion would only apply to cases where an employee was terminated prior to the release of *Loudermill*, and the employee failed to argue that the standards articulated in *Loudermill* should be retroactively applied. Under the circumstances, it is almost inconceivable that the Alabama Supreme Court Opinion would have any precedential effect on any future or pending litigation.

While the precedential effect of the opinion below is not dispositive of the issue of whether this Court should grant the Petition, it is an important factor to be considered.

CONCLUSION

For the reasons stated hereinabove, the Respondents respectfully state that this Court should deny the Petition.

Respectfully submitted,

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